

STATE OF VERMONT
PUBLIC SERVICE BOARD

Petition of Vermont Gas Systems, Inc., for a)
certificate of public good, pursuant to 30)
V.S.A. § 248 , authorizing the construction of)
the “Addison Natural Gas Project” consisting)
of approximately 43 miles of new natural gas) Docket No. 7970
transmission pipeline in Chittenden and)
Addison Counties, approximately 5 miles of)
new distribution mainlines in Addison County,)
together with three new gate stations in)
Williston, New Haven and Middlebury,
Vermont

**MOTION BY AARP TO REOPEN THE EVIDENTIARY RECORD ON PENDING
MOTIONS**

AARP moves for an order reopening the record of the pending proceedings to introduce into evidence the attached Complaints filed by Vermont Gas Systems, Inc. (VGS) against Over and Under Piping Contractors, Inc., in Chittenden Superior Court on July 16, 2015, and by Over and Under against VGS in U.S. District Court on July 21, 2015. AARP also moves for an order reopening the record to admit the press release issued by VGS on July 24, 2015, announcing it had selected a mainline construction contractor. The first Complaint and the press release provide compelling evidence that Vermont Gas Systems, Inc., withheld relevant, highly material information from the Board and the parties at the September 26, 2014, June 22, 2015 and June 23, 2015 hearings in this matter. The second Complaint provides important context, including O&U’s request for \$11.2 million in damages, and attachment of the property owned by VGS that is necessary for completion of the project.

1. The Complaint against Over and Under Piping Contractors, Inc.

The factual allegations in court pleadings complaints filed on behalf of a person or corporation are admissible against that person or corporation. They are not hearsay. Vermont

Rule of Evidence 801(d)(2); U.S. v. McKeon, 738 F.2d, 26, 31 (2d Cir. 1984). The factual allegation in the *Over and Under Piping* matter include these:

Paragraph #6. In April of 2014, VGS notified O&U that VGS intended to enter into a contract with O&U to have O&U serve as the contractor to construct the pipeline.

Paragraph #8. The contract price was “approximately \$45 million.”

Paragraph #10. The \$45 million was “a fixed price.”

Paragraph #17. VGS “was unable to obtain O&U’s execution of the contract by June 26, 2014.” Yet, despite there being no signed contract, “earth moving on the ANGP Project began” on that date.

Paragraph #18. “Between June 26 through September 2014, VGS continued unsuccessfully to attempt to obtain formal execution of the proposed written contract.”

Paragraph #19. “Between the start of work on June 26 until VGS terminated its agreement with O&U in November of 2014, O&U failed to comply with its obligation to act in good faith to finalize and execute a written contract with VGS.”

Paragraph #20. Despite the absence of an executed contract, “O&U began laying pipe” for the project on July 21, 2014.

Paragraph #25. By November of 2014, O&U had completed less than 5.65 miles of pipe installation, which was “less than 14 percent” of the project.

Paragraph #26. Yet, by November 2014, O&U had been paid \$9,187,654, “which represented 20 percent of the total that O&U was to receive for constructing the entire ANGP project.”

Paragraph #28. “In November 2014, VGS notified O&U that it was terminating its ANGP agreement with O&U without cause.”

Paragraph #29. O&U, having been terminated without cause, demanded payment of an additional \$9,671,227. O&U was seeking payment of a total of “\$18,858,881 (over 40 percent of the entire ANGP Project price), even though it ha[d] constructed only 14 percent (5.65 miles) of the ANGP pipeline.”

Paragraph # 33. In or about May of 2015, O&U recorded contractors’ liens pursuant to 9 V.S.A. § 1921 *et seq.* on real property and pipeline facilities owned by VGS in the Town of Williston. Under § 1924, such liens must be perfected by filing suit within 180 days, so VGS knew that litigation was imminent. Under § 1925, O&U has the right to foreclose on the land and improvements after perfecting the lien.

In short, according to VGS’ pleadings, as of the date of the September 26, 2014 hearing in Docket 7970, VGS knew that the contractor responsible for over a third of the costs of the then-estimated \$121 million project had consistently refused to execute the fixed-price contract submitted to it by VGS and could end up foreclosing on the portion of the pipeline already constructed. According to VGS’ pleadings, during all of July, all of August and all of September up to the date of the hearing, this contractor had “failed to comply with its obligation to act in good faith to finalize and execute a written contract with VGS.” In other words, the contractor responsible for over a third of the project’s costs was acting in bad faith and had the potential to foreclose on the portion of the pipeline already constructed.

2. No mainline contractor from November 2014 to July 24, 2015.

On July 24, 2015, VGS issued the attached press release announcing the selection of a mainline construction contractor.

From November of 2014, to July 24 of 2015, VGS had no agreement or contract with any entity to construct the pipeline.

3. **The Complaint against VGS.**

AARP does not ask the Board to accept the factual allegations in the O&U complaint. AARP asks that the Board consider the relief sought by O&U, which includes damages and attachment of the land and improvements in Williston which are necessary to completion of the project. See page 12 of the Complaint.

4. **Representations by VGS about construction costs and budget uncertainty**

These facts shed new light on VGS's submissions to the Board in September of 2014 and June of 2015 about the reliability of its new cost estimates. These facts reveal knowing nondisclosure by VGS.

During the September 26, 2014 hearing, VGS Vice-President Eileen Simollardes testified that she had reduced the contingency built into the budget submitted on July 2 because the project was more mature and she was more confident of the cost estimates. Specifically, she testified that "we have this project out to bid," and the project is now "more mature." She testified "the pipe is purchased so we know what the cost of the pipe is." She testified "We have 70 percent of the landowners under contract. So we know what that piece is." She testified "It is fully engineered except for maybe some onesies and twosies in response to individual landowners." She concluded "So the project is far more mature today than it was a year ago. So the contingency was reduced accordingly." Tr. 52-53. Vice-President Simollardes failed to explain that while it was true that "we have this project out to bid," it was also true that the contractor which had successfully bid for mainline construction, which was *\$45 million of the \$121 million* in costs, had refused to sign the fixed-price contract that VGS thought had been accepted months earlier and now VGS was without a current bid, and without a replacement contractor.

accepted Mr. Gilbert's and Ms. Simollardes' testimony. Finding of Fact #13 stated:

The updated Project cost estimate of \$121.6 million includes many cost items that are no longer projections but reflect actual costs. VGS has negotiated costs for 70% of the right-of-way easements, has purchased the pipe needed for construction, has put the Project out to bid, and has entered into contracts for some aspects of the Project. It is possible that additional cost increases may occur, and VGS has committed to providing the Board and the Department with quarterly cost updates. Tr. 9/26/14 at 51-53 (Simollardes); Simollardes remand pf. supp. at 9.

The Board then summarized AARP's and Ms. Lyons' arguments that the record showed that more cost increases were likely, and rejected them. "We find that there is a reasonable basis to conclude that the revised cost projections are reliable." The Board listed three reasons for this conclusion. "First, many of the cost elements in the revised budget are no longer projections, but reflect actual costs." Second, the revised budget included a contingency. Third, Mr. Gilbert had "testified under oath at the September 26th hearing that the project is now under new management that is capable and is producing reasonable cost projections." October 10, 2014 Order pp. 20-21.

Several weeks later, in November, VGS terminated the contract with O&U without cause and was informed by O&U that it was demanding to be paid a total of over 40 percent of the projected \$45 million in installation costs, despite having performed only 14 percent of the work. Obviously, if O&U were to prevail, the 26% difference of nearly \$12 million would have to be paid twice – once in the payments to O&U that had already been made and/or would be made, and once to the replacement contractor to do the work that O&U had not completed but was being paid for.

In December of 2014, VGS informed the Board that the new AACE methodology had revealed to VGS another \$33 million cost increase. VGS stated that it was immediately reporting this to the Board in the interests of transparency. In its letter and its subsequent prefiled testimony,

VGS remained silent about the fact that the single largest component of project cost, the \$45 million mainline construction contract, was no longer under bid or under contract, that the bidder who had been selected had been terminated without cause, that the terminated bidder was demanding to be paid nearly \$10 million more, and that VGS had not obtained a replacement contractor for this, the single largest component of the project.

During the second remand hearing on June 22, 2015, new company President Rendall was asked by the Board Chairman what percentage of the project mileage had been completed and what percentage of the project cost had been incurred. President Rendall testified that between 10 and 15 percent of the work had been done, and more than \$60 million had been spent.

Chairman Volz then asked “Now that construction season is in full swing *are there any indicators that the 154 million cost estimate is no longer accurate?*” Mr. Rendall replied to the Board Chairman: “No.” On the contrary, he explained, the company has “just completed a regular review of the cost estimate... the project remains on track inside of the 154 million dollar budget.” Mr. Rendall said “we now have a construction season behind us” which informed the latest estimate. June 22, 2015 Tr. pp.53-54, 60. He testified “We are very close to completing our contract with the new mainline contractor to complete the project.” He stated that “while we still have to conclude those negotiations, suffice to say that we are very confident that the contract pricing will come in consistent with our estimate.” 6/22/15 pp.60-62.

Board member Hofmann then asked: *[A]re there any big ticket items left in terms of contracting for the pipeline?*” Mr. Rendall replied “Well as I said, we still have to complete a big ticket item of a mainline contractor. We have procured almost all of the pipe for the project. I can’t think of a big ticket item that we don’t have pretty well nailed down at this point from a contractual basis or from an estimated basis.” Ms. Hofmann then asked: “*And what would be the*

significance of the – I think you called it the mainline pipe contractor?” Mr. Rendall answered: “When I say mainline, I mean the contractor who is actually going to install the pipeline along the route.” 6/22/15 Tr. pp. 64-65.

The Board Chairman and Ms. Hofmann were not informed that: *i)* mainline contracting was the single largest component of the project, \$45 million (by itself more than half the original \$86 million cost of the project); *ii)* during the prior regulatory proceedings, including the first remand hearing, VGS had been treating this cost component as controlled by a fixed price contract; *iii)* the mainline contractor, O&U, had worked for months while refusing to sign the fixed-price contract, had been terminated, and now was demanding to be paid as if it had completed 40% of the contract, even though the work it had completed was only 14%; *iv)* as a result, the amended project budget would suffer at least a \$12 million overrun if O&U were to prevail -- yet VGS’ *total* contingency budget was only \$16 million (Roam 1/15/15 PFT p.4); *v)* VGS had been without a replacement mainline contractor and without a fixed-price contract for mainline construction since November; and *vi)* O&U had placed contractor’s liens on VGS’ real property and pipeline improvements the month before Mr. Rendall’s testimony, and under § 1924, such liens must be perfected by filing suit within 180 days, so VGS knew on June 22 that litigation was imminent, with the concomitant threat of foreclosure on the pipeline.

One month after that testimony, VGS brought suit to try to obtain a judicial ruling that it does not owe what O&U claims and that the lien O&U had placed on VGS’ real estate and pipeline components in Williston should be released.

Several days after filing suit, VGS announced it had finally selected a new mainline contractor; the press release did not acknowledge that VGS had been without a mainline contractor since November and did not disclose whether a new fixed-price contract had been signed, and, if

so, the amount of the contract.

5. **The new evidence is probative of whether the 12/23/13 and 10/10/14 Orders should be reopened for reconsideration under Rule 60(b)**

The Board now knows that the \$86 million project is at least a \$154 million project, not a \$121 million project. The two Complaints and the press release also now inform the Board that at the time in September of 2014 when VGS witnesses assured the Board that the project was out to bid and therefore uncertainty had been reduced, the contractor which had successfully bid for mainline construction -- which was *\$45 million of the \$121 million* in costs predicted at the time - - had refused to sign the fixed-price contract that VGS thought had been accepted months earlier and now VGS was without a current bid, and without a replacement contractor, and would soon notify the contractor that its unwritten agreement was terminated, which would leave the project without a mainline contractor for 8 months.

The two Complaints and the press release therefore should be admitted to assist the Court in ruling on whether the October 10, 2014, ruling should be reopened because of newly discovered evidence. This new evidence, together with the other evidence submitted during the second remand proceedings, would probably change the outcome of the decision, which had been based upon the alleged reliability of VGS's \$121 million budget. See the October 10, 2014 Order at p.14; In re Bjerke Zoning Permit Denial, 2014 VT 13 ¶ 16, 195 Vt. 586, 593, 93 A.3d 82, 88 (trial court has broad discretion to reopen the record to admit additional evidence after a hearing but before a judgment is issued).

The documents also should be admitted to show that the prefiled testimony and live testimony submitted to the Board by VGS prior to and on September 26, 2014, were materially misleading. Under Rule 60(b)(3), this evidence is probative of AARP's claim that it was deprived

of a full and fair opportunity to litigate the first remand because of VGS's knowing nondisclosure. See Bjerke, *supra*, and Frederick v. Kirby Tankships, Inc., 205 F.3d 1277, 1287 (11th Cir.) (the standard under Rule 60(b)(3) is whether a party was deprived of the opportunity to fully and fairly litigate their claim) and Bardill Land & Lumber v. Davis, 135 Vt. 81, 82, 370 A.2d 212, 214 (1977) (knowingly false answer to pretrial interrogatory on a material subject required new trial under Rule 60(b)(3)).

These documents should also be admitted to respond to VGS' testimony in June of 2015 that there were no indicators that the \$154 million cost estimate is no longer accurate. These documents show that in May of 2015 VGS learned that O&U had placed a lien on VGS's property and pipeline improvements in Williston in support of its claim for payment of nearly \$10 million. As of June 22, these documents show, the single largest component of the project was not under contract, had never been under a signed contract, and was the subject of a legal battle that was on the verge of ending up in two trial courts.

Conclusion

The Board has now issued its decision in the penalty docket, #8328. A large penalty has been imposed. At page 23, the Board repeated what it has held many times before, that "trust and transparency" are "essential" to the regulatory process.

Prior to the hearing on September 26, 2014, VGS had already agreed to pay a penalty and had already promised to mend its ways to provide greater transparency. At the hearing, however, VGS proceeded to testify that the project's cost estimates were mature because the project had been put out to bid, and therefore cost uncertainty had been reduced, without disclosing that the contractor which had successfully bid for the supposedly fixed-price \$45 million mainline construction had been refusing to sign the fixed-price contract for three months and was acting in

bad faith.

At the June 22-23 hearing, VGS assured the Board that there were “no” indicators that the \$154 million cost estimate was no longer accurate. VGS chose not to disclose that the contractor selected for the largest component of the project, mainline installation, for a fixed price of \$45 million, had been terminated the prior November for refusing to sign the fixed-price contract, that the contractor had worked for months without a signed contract and now was demanding to be paid as if it had completed 40% of the contract even though the work it had completed was only 14%, that O&U had placed contractors’ liens on VGS’ real property and pipeline improvements the month before, and that VGS had been without a replacement mainline contractor and without a fixed-price contract for mainline construction since November.

AARP asks that the record be reopened to admit these documents.

Dated at Bristol, Vermont, this of August, 2015.

AARP

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